

ORDINANCE NO. 2821-06

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SUNNYVALE APPROVING AND ADOPTING A DEVELOPMENT AGREEMENT AMONG MOFFETT TOWERS, LLC AND THE CITY OF SUNNYVALE (LOT 3)

WHEREAS, Government Code Sections 65864 through 68569.5 provide the statutory authority for development agreements between municipalities and persons owning real property interest in the City; and

WHEREAS, pursuant to Government Code Section 65865 the City has adopted rules and regulations establishing procedures and requirements for consideration of development agreements as set forth in Resolution No. 371-81; and

WHEREAS, the City has received an application to consider a development agreement and proceedings for Lot 3 have been taken in accordance with City's rules and regulations.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SUNNYVALE DOES ORDAIN AS FOLLOWS:

SECTION 1. FINDINGS. The City Council finds that the provisions of the development agreement are consistent with the General Plan and the Moffett Park Specific Plan of the City of Sunnyvale; is compatible with the uses authorized in the regulations prescribed for the land use district in which the real property is located; is in conformity with public convenience and good land use practice; is not detrimental to the public health, safety and general welfare; and is of a beneficial effect on the order development of property and the preservation of property values; and is consistent with the requirement of Resolution 371-81.

SECTION 2. APPROVAL. The City Council hereby approves and adopts the development agreement for Lot 3 of Tract 9800 of the Moffett Park Specific Plan Area, located at 1111 Lockheed Martin Way, between Moffett Towers, LLC and the City of Sunnyvale, a copy of which is attached here to as Exhibit "A" and incorporated by reference. The City Manager and the City Clerk of the City of Sunnyvale are hereby authorized and directed to execute and attest, respectively, the Agreements on behalf of the City of Sunnyvale.

SECTION 3. CEQA. The City has examined the environmental effects of the amendments to the Moffett Park Specific Plan in a Subsequent Environmental Impact Report prepared pursuant to the California Environmental Quality Act (CEQA). The development agreement, which is the subject of this ordinance, incorporates and implements the Moffett Park Specific Plan and amendments thereto.

SECTION 4. RECORDATION. The City Clerk is directed to transmit the development agreements to the County Recorder for recordation no later than ten (10) days after the adoption of this ordinance.

SECTION 5. CONSTITUTIONALITY; SEVERABILITY. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid by a court of competent jurisdiction, such decision or decisions shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have adopted this ordinance, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more section, subsection, sentence, clause or phrase be declared invalid.

SECTION 6. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

SECTION 7. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication of a notice once in The Sun, the official newspaper for publication of legal notices of the City of Sunnyvale, setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on November 14, 2006, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, 2006, by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

ATTEST:

APPROVED:

City Clerk
(SEAL)

Mayor

APPROVED AS TO FORM:

David E. Kahn, City Attorney

DEVELOPMENT AGREEMENT

by and between

MOFFETT TOWERS LLC

A Delaware Limited Liability Company

and

CITY OF SUNNYVALE

A Charter City

(Moffett Towers Lot 3 Development Agreement)

THIS DEVELOPMENT AGREEMENT dated November ____, 2006, at Sunnyvale, California (hereinafter referred to as "Agreement"), is entered into by and between Moffett Towers LLC, a Delaware limited liability company (hereinafter referred to as "Lot 1 Landowner"), Moffett Park Drive LLC, a California limited liability company (hereinafter referred to as "Ariba Campus Landowner"), and the City of Sunnyvale, a Charter city, created and existing under the laws of the State of California (hereinafter referred to as "the City"), pursuant to the authority of Sections 65864-65869.5 of the Government Code of the State of California and City of Sunnyvale Resolution No. 371-81.

RECITALS

A. State Authorization. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California adopted Section 65864 et seq. of the Government Code (the "Development Agreement Statute"), which authorizes the City to enter into a binding property development agreement with any person having a legal or equitable interest in real property for the development associated with such property in order to establish certain development rights in the property which is the subject of the development project application.

B. City Procedure and Requirements. The City has implemented the provisions of Government Code Section 65864 et seq. and adopted certain development agreement procedures and requirements through the enactment of Resolution No. 371-81, adopted on December 15, 1981 (hereinafter referred to as the "Development Agreement Resolution").

C. Landowner. The Landowner is a successor-in-interest to Jay Paul Holdings Company ("Landowner"), limited liability companies organized under the laws of the State of Delaware and State of California.

D. Property. The subject of this Agreement is the development of that certain property commonly known as Lot 3 of the Moffett Towers Campus consisting of approximately 28.69 acres located in the City of Sunnyvale, County of Santa Clara, as described in Exhibit A-1 and depicted in Exhibit A-2 (hereinafter referred to as "Lot 3"), attached hereto and incorporated herein by reference. Property located south and east of Lot 3 is also owned by Landowner,

referred to as Lot 1, consisting of 23.20 acres, and the Ariba Campus, consisting of approximately 26.35 acres located in the City of Sunnyvale, County of Santa Clara ("neighboring Property"), collectively referred to as "the Property." Landowner will own the Property in fee and represents that all other persons holding legal or equitable interests in the Property shall be bound by this Agreement.

E. Moffett Park Specific Plan. The subject Property is located within the area subject to the Moffett Park Specific Plan, adopted by the City Council on April 26, 2004.

F. Project. The development of the Property is in accordance with the City's General Plan, the Specific Plan, as amended hereby, and the Development Approvals shall be referred to herein as the "Project." Landowner intends to develop a neighboring Property referred to as Lot 1/Ariba Campus consisting of 23.20 acres and 26.35 acres, respectively, which is the subject of a separate Development Agreement. Certain obligations contained therein affect Lot 3, hence, the intent of the Parties is to coordinate various activities to achieve integrated development of all 3 sites: Lot 1, Lot 3 and Ariba Campus.

G. The Environmental Impact Report. The City examined the environmental effects of the this Agreement and the Development Approvals in the Subsequent Environmental Impact Report (the "SEIR") prepared pursuant to the California Environmental Quality Act (CEQA). On November 14, 2006, the City Council reviewed and certified as adequate and complete the SEIR by Resolution No. _____ and approved the Development Approvals.

H. Purposes. The Landowner and City desire to enter into an agreement for the purpose of implementing the plan for development of Lot 3 and the Moffett Towers Campus as set forth herein and in the Specific Plan, as amended by this Agreement, and Development Approvals and for mitigating the environmental impacts of such development as identified in the SEIR. The City has an expressed interest in ensuring the business growth of the community by retaining and encouraging local company expansion and entering into Development Agreements is a method whereby a level of assurance can be achieved to meet that interest. The City has determined that the development of Lot 3 and the Moffett Towers Campus pursuant to the Site Plan, as amended by this Agreement, and the Development Approvals is a development for which a Development Agreement is appropriate. A development agreement will provide certain benefits to the City, as described in Section 5; will eliminate uncertainty in the City's land use planning for and secure orderly development of the Property in accordance with the policies and goals set forth in the City's General Plan; and will otherwise achieve the goals and purposes of which Resolution No. 371-81 was enacted by the City. The Landowner has incurred and will incur substantial costs in order to comply with the conditions of approval and to assure development of the Property in accordance with this Agreement. In exchange for these benefits to the City and the public, the Landowner desires to receive assurance that the City shall grant permits and approvals required for the development of the Property in accordance with the Existing City Laws, subject to the terms and conditions contained in this Agreement. In order to effectuate these purposes, the Parties desire to enter into this Agreement.

I. Planning Commission Recommendations of Approval. The application for approval of this Agreement and the appropriate California Environmental Quality Act (Public Resource Code Section 21000 et seq. "CEQA") documentation required for approval of this

Agreement, including the SEIR and all previous environmental documentation for Lot 3 for the Moffett Towers Campus were considered by the Planning Commission, on November 6, 2006 and November 13, 2006. After conducting a duly-noticed public hearing, the Commission recommended the adoption of this Agreement.

J. Adequacy of CEQA Environmental Documentation. The Sunnyvale City Council certified a program-level Moffett Park Specific Plan Environmental Impact Report (MPSP SEIR). In December 2005, Moffett Towers LLC submitted an application to the City to redevelop a portion of the MPSP referred to as Lot 1 and Lot 3. The application included development of the site at a higher intensity than what is permitted under the MPSP, requiring an amendment to the MPSP and zoning, as well as revision to the previously-certified program level MPSP SEIR. The City chose to prepare a Subsequent Environmental Impact Report (SEIR) which discusses the significant environmental effects of the Project and which were not previously addressed in the program-level MPSP. Following consideration of the CEQA environmental documentation and after conducting a duly noticed public hearing, the City Council found that the provisions of this Agreement are consistent with and within the scope of the SEIR and that adoption of this Agreement involves no new impacts not considered in the SEIR. Therefore, the City has determined no further environmental documents relating to the adoption of this Agreement are necessary or required.

K. Development Agreement Adoption. After conducting a duly noticed public hearing and making the requisite findings, the City Council by the adoption of Ordinance No. _____ on November 14, 2006, approved this Agreement and authorized its execution.

L. Consistency with Sunnyvale General Plan and Specific Plan. Development of the Property in accordance with this Agreement will provide for orderly growth and development in accordance with the policies set forth in the City General Plan, the Specific Plan, as amended hereby, and the Development Approvals. Having duly examined and considered this Agreement and having held properly noticed public hearings hereon, the City Council finds and declares that this Agreement is consistent with the General Plan of the City and with the Development Approvals.

M. Project Entitlements. This Agreement, together with the Moffett Park Specific Plan, as adopted on April 27, 2004, by Resolution No. 111-04 and Use Permit for Moffett Park Drive LLC (Ariba Campus) approved February 29, 2000, constitute the project entitlements (the "Entitlements").

N. Applicable City Laws. For purposes of the vesting protection and rights granted by this Agreement, the applicable City laws shall be those City laws in force and effect on the Effective Date of this Agreement, unless otherwise provided herein.

O. Landowner Contribution to Costs of Public Facilities and Services. Landowner agrees to contribute to the costs of such City of Sunnyvale public facilities and services as herein provided to mitigate impacts of the development of the Property, and City agrees to assure that Landowner may proceed and complete development of the Property, in accordance with the terms and conditions of this Agreement. City's approval of development of the Property as provided herein is in reliance upon and in consideration of Landowner's agreement to make such

contributions toward the costs of public improvements and services as herein provided to mitigate the impacts of development of the Property.

P. Development Agreement Ordinance. City and Landowner have taken all actions mandated by and fulfilled all requirements set forth in the Development Agreement Ordinance.

NOW THEREFORE, pursuant to the authority contained in Government Code Sections 65864-65869.5, and City of Sunnyvale Resolution No. 371-81, and in consideration of the mutual covenants and promises contained herein, the adequacy and sufficiency of which is hereby acknowledged, the Landowner and the City, each individually referred to as a Party and collectively referred to as the Parties ("Parties"), agree as follows:

AGREEMENT

1. General Provisions.

1.1 Incorporation of Recitals. The Preamble, the Recitals and all defined terms set forth in both, are hereby incorporated in this Agreement as if set forth herein in full.

1.2 Definitions. In addition to the defined terms in the Preamble and the Recitals, each reference in this Agreement to any of the following terms shall have the meaning set forth below for each such term. Certain other terms shall have the meaning set forth for such term in this Agreement.

1.2.1 Approvals. Any and all permits or approvals of any kind or character required under the City Laws in order to develop the Project, including, but not limited to, architectural review approvals, building permits, site clearance and demolition permits, grading permits and utility connection permits.

1.2.2 City Laws. The ordinances, resolutions, codes, rules, regulations and official policies of the City, governing the permitted uses of land, density, design, improvements and construction standards and specifications applicable to the development of the Property. Specifically, but without limiting the generality of the foregoing, City Laws shall include the City's General Plan, the City's Zoning Code and the City's Subdivision Code.

1.2.3 Conditions. All conditions, exactions, fees or payments, dedication or reservation requirements, obligations for on or off-site improvements, services or other conditions of approval called for in connection with the development of or construction on the Property under the Existing City Laws, whether such conditions of approval constitute public improvements, or mitigation measures in connection with environmental review of any aspect of the Project.

1.2.4 Director. The Director of the Community Development Department.

1.2.5 Enacting Ordinance. Ordinance No. _____, introduced by the City Council on November 14, 2006 and adopted by the City Council on November 21, 2006, approving this Agreement.

1.2.6 Existing City Laws. The City Laws in effect as of the Effective Date of this Agreement (as defined in Section 2.1 below).

1.2.7 Laws. The laws and Constitution of the State of California, the laws and Constitution of the United States and any codes, statutes or executive mandates in any court decision, state or federal, thereunder.

1.2.8 Party. A signatory to this Agreement, or a successor or assign of a signatory to this Agreement.

1.2.9 Property. The Property is that property described and shown on Exhibits A-1, A-2, B-1 and B-2. It is intended and determined that the provisions of this Agreement shall constitute covenants which shall run with the Property and the benefits and burdens hereof shall bind and inure to all successors-in-interest to the parties hereto.

1.2.10 Resolution No. 371-81. Resolution No. 371-81 entitled "Resolution of the City of Sunnyvale Establishing Procedures and Setting a Fee for Processing Development Agreements" adopted by the City Council of the City of Sunnyvale on December 15, 1981.

2. Effective Date; Term.

2.1 Effective Date; Recordation. The Enacting Ordinance became effective on December 21, 2006, which shall be the Effective Date of this Agreement. The obligations of the Parties under this Agreement shall be effective as of the effective date of the Enacting Ordinance (the "Effective Date"), pursuant to Government Code Section 36937. Not later than ten (10) days after the Effective Date, the Parties shall cause this Agreement to be recorded in the Official Records of the County of Santa Clara, State of California, as provided for in Government Code Section 65868.5 and Resolution No. _____. However, failure to record this Agreement within ten (10) days shall not affect its validity or enforceability by and between the Parties.

2.2 Term. Except as provided herein, the term of this Agreement shall commence on the Effective Date and terminate fifteen (15) years thereafter ("Term"); provided, however, that if the parties have not completed their obligations pursuant to Section 4.3 hereto by the expiration of such term or at the end of the first extension term, the term of this Agreement may be extended up to two times for a period of five (5) years each time in order to complete any obligations of either the City or the Landowner with respect to the extension and overpass associated with Mary Avenue, provided that in such event the City shall sign whatever estoppel certificates are reasonably requested by Landowner certifying the Landowner's completion of its other obligations pursuant to this Agreement. Following the expiration of the term, this Agreement shall be deemed terminated and of no further force and effect; provided, however, said termination of the Agreement shall not affect any right or duty emanating from

City entitlements on the Property approved concurrently with or subsequent to the approval of this Agreement.

3. General Development of the Project.

3.1 Project; Vested Entitlements.

3.1.1 The City has adopted certain approvals in connection with the Property, including the Site Plan, Development Approvals and the SEIR Certification. To the extent the provisions of this Agreement or the Development Approvals conflict with the applicable zoning provisions or the Site Plan, the Moffett Park Specific Plan shall take precedence.

3.1.2 Except as provided herein, development of the Property shall be governed by this Agreement, the Development Approvals, the Site Plan, the Moffett Park Specific Plan, and the other Development Approvals. This Agreement does not impose affirmative obligations on the Landowner to commence development of the Project, or any phase thereof, in advance of its decision to do so.

3.1.3 The permitted uses of the Property, the density and intensity of use, including, but not limited to, minimum landscape areas, maximum lot coverage, minimum and maximum number of parking spaces, and the allowable floor area ratios), and provisions for public improvements and all mitigation measures and conditions required or imposed in order to minimize or eliminate environmental impacts or any impacts of the Property applicable to development of the Property, are as set forth herein or in the Development Approvals and in ordinances, policies, and standards in effect as of the Effective Date and are hereby vested subject to the provisions of Section 4.2 below and the provisions of this Agreement ("Vested Entitlements").

3.1.4 City agrees that it will accept, in good faith, for processing, review and action, all applications for development permits or other Approvals for use of the Property in accordance with this Agreement, the Site Plan, as amended hereby, the Moffett Park Specific Plan ("Specific Plan" or "MPSP"), and the Development Approvals and shall act upon such applications in a diligent and timely manner.

3.1.5 City shall inform Landowner, upon request, of the necessary submission requirements for each application for an Approval in advance and shall schedule the application for review by the appropriate authority in a diligent and timely manner.

3.1.6 As set forth in Recitals G and J above, the environmental effects of the Site Plan, the Specific Plan, Development Approvals (including, but not limited to, the land use and development standards, the design guidelines and the infrastructure and public utility requirements contained therein) and this Agreement (including, but not limited to, the development rights and obligations vested hereby) have been thoroughly and fully examined in the SEIR. To the extent that additional Approvals are required to implement the Site Plan, as amended hereby, and the Development Approvals and/or this Agreement, the parties

acknowledge and agree that such Approvals will not result in a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment that has not already been examined in the SEIR. Moreover, because the development rights and obligations for which provision is made in this Agreement, the Site Plan, as amended hereby, and the Development Approvals are vested as of the effective date of this Agreement, so long as the Development Approvals are consistent with the MPSP, this Development Agreement and the Site Plan, as amended hereby, no further environmental review pursuant to CEQA Section 21166 will be required.

3.2 Project Phasing. Landowner and City acknowledge and agree that the Project is designed to be developed in phases. The Site Plan, this Agreement and the Development Approvals make explicit provision for such phased development. The Parties also acknowledge and agree that presently the Landowner cannot predict the timing of the Project phasing. Because the California Supreme Court held in *Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, that failure of the Parties therein to provide for the timing of development resulted in a later-adopted initiative restricting the timing of development to prevail over the Parties' agreement, it is the Parties' intent to cure that deficiency by acknowledging and providing that the Landowner shall have the right to develop the building components of the Project in phases in accordance with the Site Plan, as amended by this Agreement, and the Development Approvals and at such times as the Landowner deems appropriate within the exercise of its subjective business judgment and the provisions of this Agreement.

3.3 Other Government Permits. The Landowner or City (whichever is appropriate) shall apply for such other permits and approvals from other governmental or quasi-governmental agencies having jurisdiction over the Project (such as public utility districts, the Army Corps of Engineers or CalTrans) as may be required for the development of, or provision of services to, the Project. The City shall promptly and diligently cooperate, at no cost to the City, with the Landowner in its endeavors to obtain such permits and approvals and, from time-to-time at the request of the Landowner, shall attempt with due diligence and in good faith to enter into binding agreements with any such entity in order to assure the availability of such permits and approvals of services. To the extent allowed by law, the Landowner shall be a party or third-party beneficiary to any such agreement and shall be entitled to enforce the rights of the Landowner or City thereunder or the duties and obligations of the parties thereto. The Landowner shall reimburse the City for all its expenses, including, but not limited to, legal fees and staff time (as such costs are normally charged applicants at the time of imposition) incurred in entering such agreements.

3.4 Additional Fees. Except as set forth in this Agreement, the City shall not impose any further or additional fees, taxes or assessments, whether through the exercise of the police power, the taxing power, or any other means, other than those required by Existing City Laws and this Agreement, provided that:

3.4.1 If the City forms an assessment district including the Property, and the assessment district is City-wide or area-wide, as defined below, the Property may be legally assessed through such district based on the benefit to the Property, which assessment shall be consistent with the assessment of other property in the district similarly situated. In no event,

however, shall the Landowner's obligation to pay such assessment result in a cessation or postponement of construction of the Project or affect in any way the development rights for the Project.

3.4.2 The City may charge the Landowner the standard processing fees for land use approvals, building permits and other similar permits which are in force and effect on a City-wide basis at the time application is submitted for those permits.

3.4.3 If the City exercises its taxing power in a manner which will not change any of the Conditions applicable to the Project and so long as any taxes are uniformly applied on a City-wide or area-wide basis, as defined below, the Property may be so taxed, which tax shall be consistent with the taxation of other properties in the City or area similarly situated.

3.4.4 If state or federal laws are adopted which enable cities to impose fees on existing projects and if, consequently, the City adopts enabling legislation and imposes fees on existing projects on a City-wide basis these fees may be imposed on the Project, which fees shall be consistent with the fees imposed on other properties in the City similarly situated.

3.4.5 In no event, however, shall any fees be imposed as a condition of development or occupancy of the Project or any portion thereof.

3.4.6 For purposes of this Agreement, "area wide" shall cover not only the Property, but also at least all parcels zoned and/or developed in a manner similar to the Property and located in the combined area of the Specific Plan. The Parties acknowledge that the provisions contained in this Section 3.4 are intended to implement the intent of the Parties that the Landowner has the right to develop the Project pursuant to specified and known criteria and rules, and that the City receives the benefits which will be conferred as a result of such development without abridging the right of the City to act in accordance with its powers, duties and obligations.

4. Specific Criteria Applicable to Development of the Project. Notwithstanding anything therein to the contrary, the Site Plan and Development Approvals are hereby amended as follows:

4.1 Permitted Floor Area Ratio. Notwithstanding anything to the contrary herein or in the Development Approvals, Landowner is hereby allowed a Floor Area Ratio for Lot 3 and 70% conditioned upon meeting the requirements of the MPSP and the provisions of this Agreement. Accordingly, Landowner is permitted to construct up to 835,056 square feet of building improvements on the Property. The maximum Floor Area Ratio permitted hereunder for each of the Property and the Ariba Campus shall be measured on a gross land area basis, without deduction for roads, streets, dedications, easements, rights-of-way, or other restricted or unusable portions of such property.

4.2 Parking; Transportation Demand Management Program.

4.2.1 Property. Landowner may construct up to one (1) parking spaces for every three hundred (300) square feet of improvements constructed on the Property.

4.3 Applicable Laws and Standards. Notwithstanding any change in any Existing City Law, including but not limited to, any change by means of ordinance, resolution, initiative, referendum, policy or moratorium, and except as otherwise provided in this Agreement, the laws and policies applicable to the Property are set forth in Existing City Laws (regardless of future changes in these by the City), and this Agreement. The Project has vested rights to be built and occupied on the Property, provided that the City may apply and enforce the Uniform Building Code (including the Uniform Mechanical Code, Uniform Electrical Code and Uniform Plumbing Code) and Uniform Fire Code and all applicable hazardous materials regulations in effect at the time the Landowner applies for any particular building permits for any particular building or other development aspect of the Project.

4.4 Application of New Laws. Nothing herein shall prevent the City from applying to the Property new federal, state or City Laws that are not inconsistent or in conflict with the Existing City Laws or the intent, purposes or any of the terms, standards or conditions of this Agreement; and which do not alter the terms, impose any further or additional fees or impose any other conditions requiring additional traffic improvements/requirements or additional off-site improvements that are inconsistent with this Agreement or the intent of this Agreement. Any action or proceeding of the City that has any of the following effects on the Project shall be considered to be in conflict with this Agreement and the Existing City Laws:

4.4.1 limiting the uses permitted on the Property;

4.4.2 limiting or reducing the density or intensity of uses, the maximum height, the allowable floor area ratios, the required number of parking spaces, increasing the amount of required landscaping or reservations and dedications of land for public purposes;

4.4.3 limiting the timing or phasing of the Project in any manner that is inconsistent with or more restrictive than the provisions of this Agreement;

4.4.4 limiting the location of building sites, grading or other improvement on the Property in a manner that is inconsistent with or more restrictive than the limitations included in this Agreement; or

4.4.5 applying to the Project or the Property any law, regulation, or rule restricting or affecting a use or activity otherwise allowed by this Agreement.

The above list of actions is not intended to be comprehensive, but is illustrative of the types of actions that would conflict with this Agreement and the Existing City Laws.

4.5 Moratorium, Quotas, Restrictions or Other Limitations. Without limiting the foregoing Section 4.1 or the City's standard application processing procedures, no

moratorium or other limitation affecting building permits or other land use entitlements, or the rate, timing or sequencing thereof shall apply to the Project.

4.6 Additional Development Approvals. The Project has been subject to site and architectural review and has been recommended for approval by the City of Sunnyvale Planning Commission at a public hearing on November 6, 2006, and approved by the City Council on November 14, 2006.

4.6.1 The applicant shall prepare building plans in conformance with the Uniform Building Code (UBC) as enforced by the City of Sunnyvale. Building permits shall be issued by the City when building plans are deemed consistent with the UBC as enforced by the City of Sunnyvale.

4.6.2 Precise improvement plans for utility and infrastructure extensions shall also be submitted for approval by the City of Sunnyvale following site and architectural review and approval. Site plans, landscape and irrigation plans, and lighting plans shall also be submitted to the City for review and approval by the Director of Community Development at this time.

4.6.3 If Landowner desires to subdivide the site into smaller lots, a subdivision map shall be reviewed for approval by the City of Sunnyvale. Applications for subdivision maps shall conform to submittal requirements of the City of Sunnyvale, and shall be reviewed in accordance with the review procedures in place at the time such submittals are made ; however, further subdivision of property will not require payment of any additional traffic or housing mitigations beyond that already identified as part of the other approvals described above.

4.6.4 Following approval of a tentative subdivision map, the applicant shall prepare and file final subdivision maps in accord with the State Subdivision Map Act and City of Sunnyvale subdivision requirements.

4.6.5 No additional City approvals shall be required in order to proceed with development of the Project in accordance with the Project Entitlements.

4.7 Easements; Improvements. The City shall cooperate with the Landowner in connection with any arrangements for abandoning existing utility or other easements and facilities and the relocation thereof or creation of any new easements within the Property necessary or appropriate in connection with the development of the Project.

5. **Benefits to the City.** In addition to receiving a high quality Class A office space within a well-designed transit-oriented development with direct access to light rail, situated at a highly-visible location from U.S. Highway 101, the City will receive the following tangible benefits:

5.1 Project Impact Mitigation Funding. Landowner shall make the following contributions for the purpose of mitigating the impacts of the Project:

5.1.1 Housing Mitigation Fee in the amount of eight dollars (\$8.00) per square foot for each square foot above 35% FAR, estimated as:

<u>Lot 1</u>	\$ 4,098,534.00
<u>Lot 3</u>	<u>\$ 4,230,306.00</u>
Total	\$ 8,328,840.00

5.1.2 Traffic Impact Fees as described in the mitigation monitoring program in the SEIR for the Project and in Chapter 3.5 (Traffic Impact Fees) of the Sunnyvale Municipal Code. Fees identified in the SEIR may differ from the current Traffic Impact Fee requirements of \$4009.06 per net new one thousand (1,000) square feet of a Research and Development project located north of State Route 237. The traffic impact fee shall be at least that shown in the resolution in place at the time of Project Approval, which is estimated as:

<u>Lot 1</u>	\$ 2,669,846.00
<u>Lot 3</u>	<u>\$ 4,230,306.00</u>
Total	\$ 5,325,204.00

5.2. Landowner Contributions - Payment Schedule.

5.2.1 Housing Mitigation Fees. Landowner shall pay Housing Impact fees on an accelerated schedule over two years, or as buildings are developed, whichever occurs first. The Housing Mitigation Fees shall be paid to the City whenever a building permit is issued for a building that is part of the Project, then Landowner shall pay the City the portion of such fees associated with such building; but, in any event, Landowner shall pay the City fifty percent (50%) of all such fees associated with Lot 3 on or before the third anniversary of this Agreement, and one hundred percent (100%) of all such fees associated with Lot 3 to the City on the date that is the fourth (4th) anniversary of the date of this Agreement.

5.2.2 Traffic Impacts Fee. The parties acknowledge and agree that the payment of Traffic Impact Fee as described herein shall be paid at the time of issuance of a building permit that is part of the Project.

5.2.3 Green Building Certification. Landowner shall submit a request for certification to the U.S. Green Building Council, the first such Project within the City.

6. Annual Review.

6.1 Good Faith Compliance. The City shall, at least every twelve (12) months, during the Term of this Agreement, conduct a hearing to review the extent of good faith substantial compliance by Landowner with the terms of this Agreement. Such periodic review shall be limited in scope to compliance with the terms of this Agreement pursuant to Government Code Section 65865.1 and Resolution No. 371-81. Notice of such annual review will be provided by the Director of Community Development to Landowner thirty (30) days

prior to the date of hearing by the Planning Commission and shall include the statement that any review may result in amendment or termination of this Agreement as provided herein. A finding by the City of good faith compliance by the Landowner with the terms of Agreement shall conclusively determine the issue up to and including the date of such review. Nothing in this section shall be deemed to create a duty of responsibility of City or Landowner or define an event of default that but for such concurrent review would not have been so created or defined.

6.2 Failure to Comply in Good Faith. If the City Council makes a finding that the Landowner has not complied in good faith with the terms and conditions of this Agreement, the City shall provide written notice to the Landowner describing: (i) such failure to comply with the terms and conditions of this Agreement (referred to herein as a "Default"); (ii) the actions, if any, required by the Landowner to cure such Default; and (iii) the time period within which such Default must be cured. The Landowner shall have, at a minimum, thirty (30) business days after the date of such notice to cure such Default, or in the event that such Default cannot be cured within such thirty (30) day period but can be cured within one (1) year, the Landowner shall have commenced the actions necessary to cure such Default and shall be diligently proceeding to complete such actions necessary to cure such Default within thirty (30) days from the date of notice. If the Default cannot be cured within one (1) year, as determined by the City during periodic or special review, the City Council may modify or terminate this, Agreement as provided in Section 6(d) and Section 6(e).

6.3 Failure to Cure Default. If the Landowner fails to cure a Default within the time periods set forth above, the City Council may modify or terminate this Agreement as provided below.

6.4 Proceedings Upon Modification or Termination. If, upon a finding under Section 6(b) and the expiration of the cure period, the City determines to proceed with modification or termination of this Agreement, the City shall give written notice to the Landowner of its intention to do so. The notice shall be given at least fifteen (15) calendar days before the scheduled hearing and shall contain:

6.4.1 The time and place of the hearing;

6.4.2 A statement as to whether or not the City proposes to terminate or to modify the. Agreement; and

6.4.3 Such other information as is reasonably necessary to inform the Landowner of the nature of the proceeding.

6.5 Hearings on Modification or Termination. At the time and place set for the hearing on modification or termination, the Landowner shall be given an opportunity to be heard, and the Landowner shall be required to demonstrate good faith compliance with the terms and conditions of this Agreement. The burden of proof on the issue shall be on the Landowner. If the City Council finds, based upon substantial evidence, that the Landowner has not complied in good faith with the terms or conditions of the Agreement, the City Council may terminate this

Agreement or modify this Agreement and impose such conditions as are reasonably necessary to protect the interests of the City.

7. Permitted Delays.

7.1 Extension of Times of Performance. In addition to specific provisions of this Agreement, performance by either Party under this Agreement shall not be deemed to be in Default where delays or defaults are due to war, insurrection, strikes, lockouts, walkouts, drought, riots, floods, earthquakes, fire, casualties, acts of God, acts of the public enemy, epidemics, quarantine restrictions, freight embargoes, restrictions imposed by governmental or quasigovernmental entities other than the City, unusually severe weather, acts of the other Party, acts or the failure to act of any public or government agency or entity other than the City, or any other causes beyond the control or without the fault of the Party claiming an extension of time to perform. An extension of time for any such cause shall only be for the period of the enforced delay, which period shall commence to run from the time of the commencement of cause. If, however, notice by the Party claiming such extension is sent to the other Party more than thirty (30) days after the commencement of the cause, the period shall commence to run only thirty (30) days prior to the giving of such notice. Times of performance under this Agreement may also be extended in writing by the joint agreement of the City and Landowner. Litigation attacking the validity of this Agreement, or any permit, ordinance, or entitlement or other action of a governmental agency necessary for the development of the Property pursuant to this Agreement shall also be deemed to create an excusable delay under this Section.

7.2 Supersedure by Subsequent Laws. If any Law made or enacted after the date of this Agreement prevents or precludes compliance with one or more provisions of this Agreement, then the provisions of this Agreement shall, to the extent feasible, be modified or suspended as may be necessary to comply with such new Law. Immediately after enactment of any such new Law, the Parties shall meet and confer in good faith to determine the feasibility of any such modification or suspension based on the effect such modification or suspension would have on the purposes and intent of this Agreement. If such modification or suspension is infeasible in the Landowner's reasonable business Judgment, then the Landowner shall have the right to terminate this Agreement by written notice to the City. The Landowner shall also have the right to challenge the new Law preventing compliance with the terms of this Agreement, and, in the event such challenge is successful, this Agreement shall remain unmodified and in full force and effect.

8. Termination.

8.1 City's Right to Terminate. The City shall have the right to terminate this Agreement only under the following circumstances:

8.1.1 The City Council has determined that the Landowner is not in substantial compliance with the terms of this Agreement and this Default remains uncured, all as set forth in Section 6.

8.2 Landowner's Right to Terminate. The Landowner shall have the right to terminate this Agreement only under the following circumstances:

8.2.1 The Landowner has found the City in breach of this Agreement, has given the City notice of such breach and the City has not cured such breach within thirty (30) days of receipt of such notice or, if the breach cannot reasonably be cured within such thirty (30) day period, if the City has not commenced to cure such breach within thirty (30) days of receipt of such notice and is not diligently proceeding to cure such breach.

8.2.2 The Landowner is unable to complete the Project because of supersedure by a subsequent law or court action, as set forth in Sections 7.2 and 13.

8.2.3 The Landowner determines, in its business judgment, that it is not practical or reasonable to pursue development of the Property.

8.3 Mutual Agreement. This Agreement may be terminated upon the mutual Agreement of the Parties.

8.4 Effect of Termination.

8.4.1 General Effect. If this Agreement is terminated for any reason, such termination shall not affect any condition or obligation due to the City from the Landowner prior to the date of termination and such termination shall not affect any City entitlement or approval with respect to the Property that has been granted prior to the date of termination.

8.5 Recordation of Termination. In the event of a termination, the City and Landowner agree to cooperate with one another in executing a Memorandum of Termination to record in the Official Records of Santa Clara County within thirty (30) days of the date of termination.

9. **Remedies.** Either Party may, in addition to any other rights or remedies, institute legal or equitable action to cure, correct or remedy any default, enforce any covenant or agreement herein, enjoin any threatened or attempted violation or enforce by specific performance the obligations and rights of the Parties hereto.

10. **Waiver; Cumulative Remedies.** Failure by a Party to insist upon the strict performance of any of the provisions of this Agreement by the other Party, irrespective of the length of time for which such failure continues, shall not constitute a waiver of such Party's right to demand strict compliance by such other Party in the future. No waiver by a Party of an event of Default shall be effective or binding upon such Party unless made in writing by such Party, and no such waiver shall be implied from any omission by a Party to take any action with respect to such event of Default. No express written waiver of any event of Default shall affect any other event of Default, or cover any other period of time, other than any event of Default and/or period of time specified in such express waiver. Except as provided in this Section, all of the remedies permitted or available to a Party under this Agreement, or at law or in equity, shall be cumulative

and not alternative, and invocation of any such right or remedy shall not constitute a waiver or election of remedies with respect to any other permitted or available right or remedy.

11. Project as a Private Undertaking. It is specifically understood and agreed by and between the Parties that the Project is a private development. This Agreement is made and entered into for the sole protection and benefit of the Landowner and the City and their successors and assigns. No other person shall have any right of action based upon any provision of this Agreement. The City and Landowner hereby renounce the existence of any third-party beneficiary to this Agreement and agree that nothing contained herein shall be construed as giving any other person or entity third-party beneficiary status. No partnership, joint venture or other association of any kind is formed by this Agreement.

12. Cooperation in the Event of Legal Claim. In the event any legal action or proceeding is instituted by any third party challenging the validity of any provision of this Agreement or any action or decision taken or made hereunder, the Parties shall cooperate in defending such action or proceeding.

13. Estoppel Certificate. Either Party may, at any time, and from time-to-time, deliver written notice to the other Party requesting such Party to certify in writing that, to the knowledge of the certifying Party: (i) this Agreement is in full force and effect and a binding obligation of the Parties; (ii) this Agreement has not been amended or modified either orally or in writing, and if so amended, identifying the amendments; (iii) the requesting Party is not in default in the performance of its obligations under this Agreement, or if in default, describing therein the nature and amount of any such defaults; and (iv) the requesting Party has been found to be in compliance with this Agreement, and the date of the last determination of such compliance. A Party receiving a request hereunder shall execute and return such certificate within thirty (30) days following receipt thereof. The Director shall have the right to execute any certificate requested by the Landowner hereunder. The City acknowledges that a certificate hereunder may be relied upon by transferees and Mortgagees.

14. Right to Assign. The Landowner's rights and responsibilities hereunder may be sold or assigned in conjunction with the transfer, sale or assignment of the Property at any time during the term of this Agreement without need for the consent or approval of (but with prior written notification to) the City ten (10) days prior to assignment and further provided that any assignee shall have affirmatively assumed all of Landowner's obligations to the City. For Lot 3, the assignee shall provide adequate assurances of compliance with the conditions of development that require design features, construction of the amenities building, and other requirements to ensure transit-oriented uses and activities.

14.1 Financing. Mortgages, deeds of trust, sales and leasebacks, or other forms of conveyance required for any reasonable method of financing requiring a security arrangement with respect to the Property are permitted without the consent of the City, provided the Landowner retains the legal or equitable interest in the Property and remains fully responsible hereunder.

14.2 Release Upon Transfer. Upon the sale, transfer or assignment of the Landowner's rights and interests under this Section of this Agreement, the Landowner shall be released from its obligations pursuant to this Agreement with respect to the Property or portion thereof so transferred which arise subsequent to the effective date of the transfer.

14.3 Enforceability. The City agrees, that unless this Agreement is amended or canceled pursuant to the provisions of this Agreement and the Enacting Ordinance; this Agreement shall be enforceable by either Party notwithstanding any change hereafter in any applicable City law.

14.4 City Finding. The City hereby finds and determines that execution of this Agreement is in the best interest of the public health, safety and general welfare and is consistent with the General Plan.

15. Covenants to Run with the Land. All of the provisions, agreements, rights, powers, standards, terms, covenants, and obligations contained in this Agreement shall be binding upon the Parties and their respective heirs, successors, assignees, devisees, administrators, representatives, lessees, and all other persons acquiring the Property, or any portion thereof, or any interest therein, whether by operation of law or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors and assignees. All of the provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land pursuant to applicable laws, including, but not limited to, Section 1468 of the Civil Code of the State of California. Each covenant to do, or refrain from doing, some act on the Property hereunder: (i) is for the benefit of such properties and is a burden upon such properties; (ii) runs with such properties; and (iii) is binding upon each Party and each successive owner during its ownership of such properties or any portion thereof, and each person having any interest therein derived in any manner through any owner of such properties, or any portion thereof, and shall benefit each Party and its property hereunder, and each other person succeeding to an interest in such properties; provided that no liability or obligation shall accrue to any person, if this Agreement terminates pursuant to Section 8 of this Agreement.

16. Amendment.

16.1 Amendment or Cancellation. Except as otherwise provided in this Agreement, this Agreement may be canceled, modified or amended only by mutual consent of the Parties in writing, and then only in the manner provided for in Government Code Section 65868 and Resolution No. 371-81. Minor amendments to this Agreement may be made without a public hearing upon approval of the director of community development. "Minor Amendments" shall mean amendments which are similar in significance to the type of minor amendments to land use entitlements that may be made without a full public hearing or approval of the Planning Commission or City Council pursuant to the Sunnyvale Municipal Code.

16.2 Recordation. Any amendment, termination or cancellation of this Agreement shall be recorded by the City Clerk not later than ten (10) days after the effective date

of the action effecting such amendment, termination or cancellation; however, a failure to record shall not affect the validity of the amendment, termination or cancellation.

16.3 Amendment Exemptions. The following actions shall not require an amendment to this Agreement:

16.3.1 Subdivision. The subdivision of the, Property, or the filing of a parcel map or subdivision map that creates new legal lots, shall not require an amendment to this Agreement. Any subdivision does not change the requirements set forth under the MPSP, as amended, the Site Plan, as amended by this Agreement, the Development Approvals, or this Agreement. The Landowner may subdivide the Property in accordance with the laws regarding subdivision in effect in the City at the time the Landowner applies for any subdivision, and in such event that City shall not impose any conditions regarding traffic improvements or requirements or off-site improvements, or impose any fees, taxes, or assessments in connection with such subdivision other than those set out in this Agreement.

16.3.2 Architectural Review. Further architectural review of specific aspects of the Project that is substantially consistent with the Site Plan, as amended by this Agreement, and the Development Approvals shall not require an amendment to this Agreement.

17. Notices.

17.1 Procedure. Any notice to either Party shall be in writing and given by delivering the notice in person or by sending the notice by registered or certified mail, or Express Mail, return receipt requested, with postage prepaid, to the Party's mailing address.

17.2 Mailing Addresses. The respective mailing addresses of the Parties are, until changed as hereinafter provided, the following:

City: Director of Community Development
City of Sunnyvale
456 W. Olive Avenue
P.O. Box 3707
Sunnyvale, CA 94088

With a copy to: City Attorney
City of Sunnyvale
456 W. Olive Avenue
P.O. Box 3707
Sunnyvale, CA 94088

Landowners: Moffett Towers LLC
c/o Jay Paul Company
350 California Street, Suite 1905
San Francisco, CA 94104
Attn: Ms. Janette Sammartino

Moffett Park Drive LLC
c/o Jay Paul Company
350 California Street, Suite 1905
San Francisco, CA 94104
Attn: Ms. Janette Sammartino

With a copy to: Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center
17th Floor
San Francisco, CA 94111
Attn: Doug Van Gessel

Either Party may change its mailing address at any time by giving ten (10) days notice of such change in the manner provided for in this section. All notices under this Agreement shall be deemed given, received, made or communicated on the date personal delivery is effected or, if mailed, on the delivery date or attempted delivery date shown on the return receipt. Nothing in this provision shall be construed to prohibit communication by facsimile transmission, so long as an original is sent by first class mail, commercial carrier or is hand-delivered.

18. Miscellaneous.

18.1 Approvals. Unless otherwise provided herein, whenever approval, consent or satisfaction (herein collectively referred to as an "approval") is required of a Party pursuant to this Agreement, such approval shall not be unreasonably withheld. If a Party shall disapprove, the reasons therefor shall be stated in reasonable detail in writing. Approval by a Party to or of any act or request by the other Party shall not be deemed to waive or render unnecessary approval to or of any similar or subsequent acts or requests.

18.2 Project Approvals Independent. All approvals which may be granted pursuant to this Agreement, and all approvals or other land use approvals which have been or may be issued or granted by the City with respect to the Property, constitute independent actions and approvals by the City. If any provisions of this Agreement or the application of any provision of this Agreement to a particular situation is held by a court of competent jurisdiction to be invalid or unenforceable, or if the City terminates this Agreement for any reason, such invalidity, unenforceability or termination of this Agreement or any part hereof shall not affect the validity or effectiveness of any approvals or other land use approvals. In such cases, such approvals will remain in effect pursuant to their own terms, provisions and conditions.

18.3 Not a Public Dedication. Nothing herein contained shall be deemed to be a gift or dedication of the Property, or of the Project, or any portion thereof, to the general public, for the general public, or for any-public use or purpose whatsoever. This proscription does not extend to any portion of the Property which may be dedicated in compliance with any conditions of approval. The Landowner shall have the right to prevent or prohibit the use of the Property or the Project, or any portion thereof, including common areas and buildings and improvements

located thereon; by any person for any purposes inimical to the operation of a private, integrated Project as contemplated by this Agreement.

18.4 Severability. Invalidation of any of the provisions contained in this Agreement, or of the application thereof to any person, by judgment or court order, shall in no way affect any of the other provisions hereof or the application thereof to any other person or circumstance and the same shall remain in full force and effect, unless enforcement of this Agreement as so invalidated would be unreasonable or grossly inequitable under all the circumstances or would frustrate the purposes of this Agreement.

18.5 Construction of Agreement. The provisions of this Agreement and the Exhibits shall be construed as a whole according to their common meaning and not strictly for or against any Party in order to achieve the objectives and purpose of the Parties. The captions preceding the text of each Article, Section, Subsection and the Table of Contents are included only for convenience of reference and shall be disregarded in the construction and interpretation of this Agreement. Wherever required by the context, the singular shall include the plural and vice versa, and the masculine gender shall include the feminine or neuter genders, or vice versa. All references to "person" shall include, without limitation, any and all corporations, partnerships or other legal entities.

18.6 Other Necessary Acts. Each Party covenants, on behalf of itself and its successors, heirs and assigns, to take all actions and do all things, and to execute, with acknowledgment or affidavit if required, any and all further instruments, documents and writings as may be reasonably necessary or proper to achieve the purposes and objectives of this Agreement and to secure the other party the full and complete enjoyment of its rights and privileges hereunder.

18.7 Applicable Law. This Agreement, and the rights and obligations of the Parties, shall be construed by and enforced in accordance with the laws of the State of California.

18.8 Equal Authorship. This Agreement has been reviewed by legal counsel for both the Landowner and City, and no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Agreement.

18.9 Time. Time is of the essence of this Agreement and of each and every term and condition hereof. In particular, the City agrees to act in a timely fashion in accepting, processing, checking and approving all maps, documents, plans, permit applications and any other matters requiring the City's review or approval relating to the Project or Property. Subject to extensions of time by mutual consent in writing, unreasonable delay by either party to perform any term or provision of this Agreement shall constitute a default.

18.10 Subsequent Projects. After the effective date of this Agreement, the City may approve other projects that place a burden on the City's infrastructure; however, it is the intent and agreement of the Parties that Landowner's right to build and occupy the Project, as described in this Agreement, shall not be diminished despite the increased burden of future approved development on public facilities.

18.11 Entire Agreement. This written Agreement and the Exhibits contain all the representations and the entire agreement between the Parties with respect to the subject matter hereof. Except as otherwise specified in this Agreement, any prior correspondence, memoranda, agreements, warranties or representations are superseded in total by this Agreement and Exhibits.

18.12 Form of Agreement; Exhibits. This Agreement is executed in three duplicate originals, each of which is deemed to be an original. This Agreement consists of twenty-three pages and two exhibits which constitute the entire understanding and agreement of the parties. Said exhibits are identified as follows:

Exhibits A-1 and A-2:	Property Description and Plat Map or Site Map
Exhibits B-1 and B-2:	Lot 3 Property Description and Plat Map or Site Map
Exhibits C-1 and C-2:	Ariba Campus Property Description and Plat Map or Site Map

18.14 Authority. The Parties hereby represent that the person hereby signing this Agreement on behalf of each respective Party has the authority to bind the Party to the Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

<p>"City"</p> <p>CITY OF SUNNYVALE A Charter City</p> <p>By: _____ Name: _____ Title: _____ Date: _____</p> <p>Attest:</p> <p>_____ Katherine Chappellear, City Clerk</p> <p>Approved as to Form:</p> <p>_____ David E. Kahn, City Attorney</p>	<p>"Landowner"</p> <p>MOFFETT PARK LLC, a Delaware limited liability company</p> <p>By: Moffett Towers Management, Inc., a Delaware corporation, its managing member</p> <p>By: _____ Jay Paul, its President and Secretary "Moffett Park Drive LLC"</p> <p>MOFFETT PARK DRIVE LLC, a California limited liability company</p> <p>By: Gateway Land Company, Inc., a California corporation, Member and Manager</p> <p>By: _____ Jay Paul, Its President</p> <p>By: _____ Jay Paul, Member</p>
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